

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**MERCK, SHARP & DOHME CORP.**

**and**

**Case 06-CA-163815**

**UNITED STEEL, PAPER AND FORESTRY,  
RUBBER, MANUFACTURING, ENERGY,  
ALLIED INDUSTRIAL AND SERVICE  
WORKERS INTERNATIONAL UNION, LOCAL  
10-580, AFL-CIO, CLC**

**MERCK, SHARP & DOHME CORP.**

**and**

**Case 05-CA-168541**

**LOCAL 94C, INTERNATIONAL CHEMICAL  
WORKERS COUNCIL OF THE UNITED FOOD  
AND COMMERCIAL WORKERS  
INTERNATIONAL UNION, AFL-CIO**

**MERCK, SHARP & DOHME CORP.**

**and**

**Case 22-CA-168483**

**UNITED STEEL, PAPER AND FORESTRY,  
RUBBER, MANUFACTURING, ALLIED  
INDUSTRIAL AND SERVICE WORKERS  
INTERNATIONAL UNION, LOCAL 4-575,  
AFL-CIO, CLC**

**RESPONDENT MERCK, SHARP & DOHME CORPORATION'S**  
**MOTION TO REOPEN THE RECORD TO ADDUCE ADDITIONAL EVIDENCE**  
**RELEVANT TO RESPONDENT'S DUE PROCESS CLAIM**

Merck, Sharp & Dohme Corp. ("Merck" or "Respondent"), by and through their undersigned counsel, submit the following Motion to Reopen the Record to Adduce Additional Evidence Relevant to Respondent's Due Process Claim (the "Motion"), pursuant to Section 102.47 and 102.48(d)(1) & (2) of the National Labor Relations Board's rules and regulations, and state as follows:

1. On February 17, 2017 Respondent timely filed its Statement of Exceptions and Brief in Support of its Exceptions to the Administrative Law Judge's ("ALJ") Decision and Recommended Order ("D&RO").

2. Respondent raised several exceptions to the D&RO including that the ALJ violated the Respondent's due process rights by finding it guilty on a theory of violation that was not pled in the Complaint or litigated at trial.

3. The General Counsel represented to the ALJ at the start of trial that he was pursuing a narrow theory of violation specific to union activity at the Respondent's Rahway, New Jersey and West Point, Pennsylvania plants.

4. Consistent with his opening statement, the General Counsel's *prima facie* case presentation at the hearing was limited to the Company's alleged retaliation against the unions for causing "labor problems" at the Rahway, New Jersey plant by filing grievances, requesting information and disputing the Company's interpretation of recently negotiated contract language. All of the General Counsel's witnesses and documents were focused on the "Rahway labor problems" theory of the case, as was the Company Counsel's cross-examinations of the General Counsel's witnesses.

5. Despite the General Counsel's express limitation of the theory of violation to retaliation for "labor problems" at Rahway, New Jersey and West Point, Pennsylvania, the ALJ found a violation on a wholly different theory of retaliation based on unidentified unions' refusal "in recent years ... to accommodate Merck's mid-contract requests for 'minor changes' in payroll and 401(k) administration and holiday issues." *See* D&RO at 9:43-45.

6. As argued in Respondent's Brief, the ALJ's radical change in theory violated Respondent's due process rights because Respondent was never provided notice of or given a chance to "fully and fairly litigate" the ALJ's novel retaliation theory. *See* Exceptions and Brief, pg. 42-49.

7. The Motion is filed contemporaneously with Respondent's exceptions and seeks to open the record to adduce additional evidence supporting Respondent's due process violation exception. Respondent seeks to add to the record a series of emails between the General Counsel and Respondent's counsel. In these emails, the General Counsel confirms that the sole theory of violation he will pursue at the hearing is retaliation based on protected concerted activities at Respondent's Rahway, New Jersey and West Point, Pennsylvania plants. *See* Declaration of Mark J. Foley, attached hereto as Exhibit A.

8. As evidenced by the attached emails, Respondent reasonably relied on the representations of the General Counsel as to the protected conduct at issue in developing the presentation of its case for the hearing. Had the Company been given advance notice of the ALJ's theory of the case, it would have presented additional witnesses and documents fleshing out the genesis of Respondent's bargaining strategy and a broader set of reasons and examples to support it. The Company also would have had the opportunity to fully brief the novel legal issues raised by the ALJ's unprecedented view of the law on a properly developed record.

9. Rules 102.47 and 102.48(d)(1) & (2) allow for additional evidence to be adduced where the additional evidence, “if adduced and credited,” would require a different result.

10. The attached emails require a different result because they demonstrate the General Counsel’s limitation of his theory of violation and Respondent’s reasonable reliance on the representations of the General Counsel as to the theory of violation to be tried. The ALJ’s *sua sponte* decision to find Respondent guilty of a new theory violates Respondent’s due process rights.

11. Respondent did not introduce the attached emails during the hearing because it never received notice that a theory other than the one articulated by the General Counsel would be litigated.

12. The attached emails directly relate to whether Respondent’s due process rights were violated and constitute evidence that would have been received at the hearing had the General Counsel or the ALJ provided Respondent with notice of a change in the theory of violation.

13. Respondent requests that the emails be made part of the record in this matter.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Mark J. Foley', with a long horizontal line extending to the right.

Mark J. Foley  
Matthew A. Fontana  
Drinker Biddle & Reath LLP  
One Logan Square, Ste. 2000  
Philadelphia, PA 19103-6996

Attorneys for Merck, Sharp & Dohme Corp.

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**DECLARATION OF MARK J. FOLEY PURSUANT TO 28 U.S.C. § 1746**

I, Mark J. Foley, declare pursuant to 28 U.S.C. § 1746 as follows:

1. I am a partner at the law firm of Drinker Biddle & Reath LLP and represent Merck, Sharpe & Dohme Corp. in the above captioned matter.

2. On February 16, 2017, I retrieved from my Drinker Biddle & Reath LLP email account the following emails between David L. Shepley, Counsel for the General Counsel, Region 6, and myself containing discussions of the limited theory of violation Mr. Shepley stated he would pursue at the hearing:

- September 23, 2016 email from Mr. Foley to Mr. Shepley;
- September 26, 2016 email from Mr. Shepley to Mr. Foley;
- September 29, 2016 email from Mr. Shepley to Mr. Foley;
- September 29, 2016 email from Mr. Foley to Mr. Shepley.

3. True and correct copies of the above are attached as Exhibit 1. One email contains redaction of the material that is not relevant to the issue under consideration.

4. The foregoing statements are true and correct to the best of my knowledge, information and belief, and I make them on the basis of my personal knowledge.

Executed on this 17th day of February, 2017.



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Mark J. Foley

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**Foley, Mark J.**

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**From:** Foley, Mark J.  
**Sent:** Friday, September 23, 2016 2:56 PM  
**To:** Shepley, David L.  
**Subject:** RE: Merck NLRB cases

Dave,

During our September 12 call, we discussed my objection to the lack of specificity in paragraph 9 of the Complaint regarding the relevant protected concerted activity, and the unfairness and deprivation of due process involved in requiring Respondent to guess at what that activity might be given our stated desire to defend Respondent through witnesses testimony at the hearing. Please confirm as we discussed on the phone that the protected concerted activities the Region will rely upon at the hearing to support the Complaint allegations are limited to union activities at the Respondent's Rahway facility and specifically identify what those activities are.

If you unable or unwilling to do that, please let me know by Monday (9/26) afternoon at the latest so that Respondent can file a motion with the ALJ.

Mark J. Foley  
**Drinker Biddle & Reath LLP**  
One Logan Square, Ste. 2000  
Philadelphia, PA 19103-6996  
(215) 988-2744 *office*  
(215) 284-4637 *mobile*  
Mark.Foley@dbr.com  
[www.drinkerbiddle.com](http://www.drinkerbiddle.com)

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**From:** Shepley, David L. [<mailto:David.Shepley@nlrb.gov>]  
**Sent:** Friday, September 02, 2016 10:37 AM  
**To:** Foley, Mark J.  
**Subject:** Merck NLRB cases

Mark,

I am trying to get the clearest answer for you on the protected activity question. I will contact you probably next week.

Dave Shepley

**Foley, Mark J.**

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**From:** Shepley, David L. <David.Shepley@nrlrb.gov>  
**Sent:** Monday, September 26, 2016 4:07 PM  
**To:** Foley, Mark J.  
**Cc:** Fontana, Matthew A.  
**Subject:** Rahway protected activity

Mark,

I will present testimony at the trial describing the following protected activity engaged in by the employees/Union at Rahway: (1) numerous grievances and arbitrations; (2) disputes over information requests made by the Union; (3) safety policies and related issues; and (4) implementation of terms in the 2015 contract where the Union and Merck are in disagreement.

REDACTED

I will send you today or early tomorrow a list of proposed stipulations that includes the communications I will be offering into evidence. Such a stipulation will allow the custodian of records to not testify.

It turns out that the subpoena duces tecum went out by regular mail to you on Tuesday, September 20, not the 19<sup>th</sup>. It still should have arrived in Philadelphia by Friday at the latest. I could not find any record that you requested that documents be given to you electronically. We would comply with such a request and you are on record in these cases through what you have orally told me today.

Thanks for your cooperation.

Dave Shepley

**Foley, Mark J.**

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**From:** Shepley, David L. <David.Shepley@nlrb.gov>  
**Sent:** Thursday, September 29, 2016 12:30 PM  
**To:** Foley, Mark J.  
**Subject:** RE: Proposed stip in Merck cases

Yes, call me. 412-690-7118

**From:** Foley, Mark J. [mailto:Mark.Foley@dbr.com]  
**Sent:** Thursday, September 29, 2016 12:06 PM  
**To:** Shepley, David L. <David.Shepley@nlrb.gov>  
**Cc:** Fontana, Matthew A. <Matthew.Fontana@dbr.com>  
**Subject:** Re: Proposed stip in Merck cases

Dave,

A little late in the game to be shifting gears like this. Are you available today to discuss?

Mark

Sent from my iPhone

On Sep 29, 2016, at 10:31 AM, Shepley, David L. <[David.Shepley@nlrb.gov](mailto:David.Shepley@nlrb.gov)> wrote:

Mark and Matthew,

I am proposing an additional stip in these cases, as set forth below in red font. The Charging Parties in these cases strongly believe that evidence regarding labor relations between Merck and the USW Local 10-00086 at West Point should be in the record. I have stated to you that I will present testimonial evidence regarding only Rahway and I hold to that. However, to avoid an issue regarding the Unions introducing evidence concerning West Point at the hearing, I propose stip #7 below. It should be factually correct and, of course, you and I can both argue as to any relevance to the cases.

Please let me know your response to the revised list of proposed stip in as soon as possible. Thank you.

Dave Shepley

**From:** Shepley, David L.  
**Sent:** Tuesday, September 27, 2016 12:32 PM  
**To:** 'Foley, Mark J.' <[Mark.Foley@dbr.com](mailto:Mark.Foley@dbr.com)>; '[matthew.fontana@dbr.com](mailto:matthew.fontana@dbr.com)' <[matthew.fontana@dbr.com](mailto:matthew.fontana@dbr.com)>  
**Subject:** Proposed stip in Merck cases

Mark and Matthew,

I propose that all parties enter into a series of stipulations to streamline the trial. These stip that I propose are as follows:

1. On July 28, 2015, the CEO of Merck, Sharp & Dohme Corp. (hereinafter "Merck"), Kenneth Frazier, announced to Merck's employees worldwide that only certain employees would have September 4, 2015, off with pay. The announcement is Joint Exhibit 1 (JX-1).
2. In accordance with the announcement in JX-1, Merck's employees in the United States who are covered by a collective bargaining agreement were not given September 4, 2015, off with pay.
3. Certain employees at Merck's Riverside, PA plant were represented by United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 10-580, AFL-CIO, CLC (hereinafter "Local 10-580") under a collective bargaining agreement as of September 4, 2015, and that status remains unchanged to date.
4. Certain employees at Merck's Rahway, NJ plant are represented by United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 4-575, AFL-CIO (hereinafter "Local 4-575") under a collective bargaining agreement as of September 4, 2015, and that status remains unchanged to date.
5. Certain employees at Merck's Elkton, VA plant were represented by Local 94C, International Chemical Workers Council of the United Food and Commercial Workers International Union, AFL-CIO (hereinafter "Local 94C") under a collective bargaining agreement as of September 4, 2015, and that status remains unchanged to date.
6. Certain members of Merck management and certain officers of Local 10-580, Local 4-575, Local 94C and other union officers addressed in writing the events described in Stipulations #1 and 2, above. Those written communications include the following:
  - (1) A letter from Daniel Bangert, President of United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 10-00086, AFL-CIO, CLC, dated July 30, 2015. (JX-2)
  - (2) An email from Merck CEO Kenneth Frazier to Daniel Bangert dated July 31, 2015. (JX-3)
  - (3) An email from Daniel Bangert to Kenneth Frazier dated July 30, 2015. (JX-4)
  - (4) An announcement by Elisabeth D. Goggin, Merck's Head of Global Labor Relations dated July 31, 2015. (JX-5)
  - (5) A letter from six union officers, including Daniel Bangert, Edward J. Vallo, President of Local 10-580, James Conway, President of Local 4-575, and Timmy Finch, President of Local 94C, to Kenneth Frazier dated August 17, 2015. (JX-6)
7. In about 2012 United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 10-00086, AFL-CIO, CLC (hereinafter "Local 10-00086"), which represents a unit of employees at Merck's West Point, PA facility, ceased to participate in departmental safety committee meetings contrary to the wishes of Merck; Local 10-00086 resumed participation in those meetings in 2016.

Let me know if you can agree to this statement and accompanying exhibits going into the record. Thanks.

Dave Shepley  
Region Six

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Drinker Biddle & Reath LLP is a Delaware limited liability partnership. The partner responsible for the firm's Princeton office is Jonathan I. Epstein, and the partner responsible for the firm's Florham Park office is Andrew B. Joseph.

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